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# The Cuckoo's Nest Reassessed: Involuntary Commitments in California after Suzuki v. Yuen and Doe v. Gallinot

Gretchen O. Burford

# COMMENTS

## THE "CUCKOO'S NEST" REASSESSED: INVOLUNTARY COMMITMENTS IN CALIFORNIA AFTER SUZUKI v. YUEN AND DOE v. GALLINOT*

> It makes little sense to guard zealously against the possibility of unwarranted deprivations prior to hospitalization, only to abandon the watch once the patient disappears behind hospital doors.
>
> Chief Judge Bazelon in Covington v. Harris[1]

### I. INTRODUCTION

Civil commitments occupy a unique position in our present civil system. Under the commitment statutes of most states, the government can commit when there has been no violative act. A person can be incarcerated on the basis of a prediction of danger to self or others, or (in California) on the basis of grave disability. A further anomaly is that "the treatment decision is made by people trained in the law," while "the question of criminality is left to physicians."[2]

The problems inherent in predictions of dangerousness have been well documented. Perhaps the most dramatic illustration of error in diagnosis and follow-up is the experiment of Dr. N.L. Rosenhan where eight sane persons feigning illness were diagnosed as being mentally ill. The patients gave true life histories to the examiner. None had serious pathological backgrounds. They entered mental institutions where immediately upon admission they ceased their simulations of abnor-

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1. 419 F.2d 617, 623-24 (D.C. Cir. 1969).

2. Alexander, *Premature Probate: A Different Perspective on Guardianship for the Elderly*, 31 STAN. L. REV. 1003, 1029 (1979).

mal behavior. However, their subsequent behavior was either overlooked or profoundly misinterpreted. All were released after an average stay of nineteen days with a diagnosis of schizophrenia in remission.[3] Ironically, it was fairly common for the actual mental patients to detect the sanity of the pseudopatients. Rosenhan's conclusion was that psychiatrists tend to err on the side of caution, because "it is clearly more dangerous to misdiagnose illness than health."[4]

Because of the unique position of civil commitments in the legal system and the problems inherent in a "predictive" system of justice, the courts have increased their scrutiny of this process. The result has been more due process protections for the mentally ill.[5] This comment will focus on the failure of California's mental health law to provide due process protections for the mentally ill during the initial seventy-two hour evaluation and treatment period and the subsequent period where the patient, having been evaluated, is certified for fourteen days of involuntary intensive treatment.[6] Due process inequities include a failure to provide counsel and probable cause hearings during this time. This comment analyzes the California statutory criteria for involuntary commitments. The current standard is not sufficiently precise, as it allows commitment on the basis of grave disability alone. This lack of precision encourages additional due process violations of patients' rights in the initial stages of commitment. In two recent decisions, *Suzuki v. Yuen*[7] and *Doe v. Gallinot*,[8] the federal courts have examined both the statutory criteria for commitment and the due process protections during evaluation and certification. This comment examines the impact of these two decisions on California law, concluding with suggested changes in evaluation and certification provisions under the

3. Rosenhan, *On Being Sane in Insane Places*, 13 SANTA CLARA LAW. 379, 382-84 (1973).

4. *Id.* at 385.

5. For a description of the prior chequered history of court commitments see Lessard v. Schmidt, 349 F. Supp. 1078, 1084-94 (E.D. Wis. 1972) *vacated and remanded*, 414 U.S. 473 (per curiam) (to create a more specific and detailed order), 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded*, 421 U.S. 957 (1975) (mem.) (for further consideration in light of a recent decision), 413 F. Supp. 1318 (E.D. Wis. 1976). *See also* Suzuki v. Alba, 438 F. Supp. 1106, 1110 (D. Hawaii 1977).

6. CAL. WELF. & INST. CODE §§ 5150, 5250 (West 1972 & Supp. 1982).

7. 617 F.2d 173 (9th Cir. 1980).

8. 486 F. Supp. 983 (C.D. Cal. 1979), *aff'd* 657 F.2d 1017 (9th Cir. 1981).

Lanterman-Petris-Short Act (LPS).[9]

## II. BACKGROUND

### A. *Federal Decisions*

Judicial analysis of mental health law reveals two common themes: concern about the high risk of error inherent in the initial commitment recommendation and concern for the loss of liberty and stigma attached to civil commitments. In *Humphrey v. Cady*, the Supreme Court took note of the indisputable fact that civil commitment entails "a massive curtailment of liberty" in the constitutional sense.[10] In *O'Connor v. Donaldson*, the Court rejected deprivation of an individual's liberty on the basis of mental illness alone if the person is "dangerous to no one and can live safely in society."[11] The Court in *O'Connor*, avoided defining the exact basis for commitment but provided some guidelines: 1) Incarceration cannot be used to raise "the living standards of those capable of surviving safely in freedom" and 2) "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."[12]

Recently, the Court, in *Addington v. Texas*,[13] held that the need for civil commitment must be provided by clear and convincing evidence. The Court stated that "due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence."[14] Although the Court's decision was based on the individual's right to liberty,[15] it also expressed concern about the risk of error involved in the commitment process.[16] The loss of liberty and the stigma attached to mental commitments served as the rationale for the Supreme Court in *Vitek v. Jones*,[17] when it held that notice and a hearing are required prior to the trans-

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9. CAL. WELF. & INST. CODE §§ 5000-464 (Deering 1979 & Supp. 1982); 1968 Cal. Stat. ch. 1374.

10. 405 U.S. 504, 509 (1972).

11. 422 U.S. 563 (1975). *See also* Schlette v. Burdick, 633 F.2d 920, 922 (9th Cir. 1980) (*O'Connor* standard applied to involuntary commitment of a severely disabled individual).

12. 422 U.S. at 575.

13. 441 U.S. 418 (1979).

14. *Id.* at 425.

15. *Id.*

16. *Id.* at 427.

17. 445 U.S. 480, 491-93 (1979).

fer of a convicted felon from a prison to a mental hospital. The *Vitek* Court additionally required that the state provide a qualified and independent advisor to assist the patient.[18] The district court decision providing the most procedural protections for the mentally ill is *Lessard v. Schmidt*.[19] The decision reflects the current tendency of many district courts to adopt the *O'Connor-Addington* line of reasoning, thereby modifying the *parens patriae* concept of the state as provider and protector of the mentally ill. The result is a legalistic standard that requires more specificity and greater procedural protections in commitment statutes. The *Lessard* court mandated a finding of imminent dangerousness as evidenced by a recent overt act *before* confinement for evaluation. Post-commitment requirements imposed by the court include the equivalent of a *Miranda* warning to the patient, probable cause hearings and treatment within forty-eight hours, mandatory court hearings within seventeen days with the assistance of counsel and, finally, a state investigation of the least restrictive alternative to commitment.[20]

### B. *LPS: California's Response to the Need for Reform*

The increased concern over the rights of the mentally ill has led to inevitable tension between the mental health providers and the legal system.[21] For example, psychiatrists, resentful of the legalistic approach, perceive the time constraints created by the courts as a threatening incursion on their need to diagnose and treat with relative freedom. The California Legislature, in rewriting its mental commitment statute, attempted to reconcile these differences. In the Lanterman-Petris-Short Act (LPS),[22] the legislature opted to reduce long-term confinement of the mentally ill. To please the medical community, the legislature allowed the local treatment system to hold a person a maximum of seventeen days

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18. *Id.* at 499-500.

19. 349 F. Supp. 1078, 1090-1102 (E.D. Wis. 1972). *See supra* note 5 for subsequent case history.

20. 379 F. Supp. at 1380-82. *See supra* note 5 for prior and subsequent case history.

21. *See generally* K. MILLER, MANAGING MADNESS (1976). *See also* ENKI RESEARCH INSTITUTE, A STUDY OF CALIFORNIA'S NEW MENTAL HEALTH LAW, 1969-1971, 131-34 (1972) [hereinafter cited as ENKI].

22. CAL. WELF. & INST. CODE §§ 5000-464 (Deering 1979 & Supp. 1982); 1968 Cal. Stat. ch. 1374.

without mandatory judicial review and to please the advocates of due process reform, the legislature mandated that any care beyond this seventeen day period was to be accomplished only after judicial review.[23]

Evaluation confinement can be triggered by a police officer, a staff member of an evaluation facility, or another professional who has probable cause to believe that a person, as a result of a mental disorder, is dangerous to himself, or to others, or is gravely disabled.[24] After a seventy-two hour detention, the statute allows certification under section 5250 for an additional fourteen days of intensive treatment if:

> 1) The staff finds that the person is dangerous to himself or to others, or is gravely disabled.
> 2) The person has been advised of but has not accepted voluntary treatment. and
> 3) The facility can provide treatment.[25]

The fourteen day certification is performed ex parte and no hearing is required prior to certification. A copy of the certification notice is delivered to the patient and, at this time, he is informed of his right to habeas corpus review and counsel.[26] In addition, the term "habeas corpus" must be explained to him.[27] If the patient or another person acting on his behalf requests a hearing during the fourteen day treatment period, this request must be relayed to the superior court. Hearings are to be held within two days of filing the petition.[28] If a patient does not exercise his habeas corpus right, he can be detained involuntarily for a total period of seventeen days (seventy-two hours plus fourteen day certification) without any judicial review.

The review stage that occurs post-certification requires different procedures for different categories of patients.[29] The

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23. ENKI, *supra* note 21 at 15-16. *See also* Thorn v. Superior Court, 1 Cal. 3d 666, 464 P.2d 56, 62 Cal. Rptr. 600 (1970).

24. CAL. WELF. & INST. CODE § 5150 (West 1972 & Supp. 1982).

25. *Id.* at § 5250.

26. *Id.* at § 5252.1. A copy must also be delivered to the district attorney, the state Department of Mental Health, and a person designated by the patient. *Id.* at § 5253.

27. *Id.* at § 5252.1.

28. *Id.* at §§ 5275, 5276.

29. The following categories of patients and review procedures have been established by the legislature: 1) The imminently dangerous—ninety day post evaluation detention with mandatory review, CAL. WELF. & INST. CODE § 5300 (West 1972 &

commitment procedure, therefore, is quite simple at the initial stages becoming more complex for longer periods of commitment. The result for the patient, however, is very little, if any, due process protection prior to and during the seventeen day evaluation-certification period. Moreover, the conclusions drawn during this time by hospital staff are crucial to decisions for future incarceration. The legislature's compromise was thus made at the expense of the allegedly mentally ill person who has not committed any violative act, and yet can be confined as long as seventeen days without a hearing.

### C. *California Decisions*

This comment will emphasize federal court decisions because, for the most part, the California courts have not dealt with the failure of LPS to provide due process protections during the evaluation-certification period. The state courts have focused on post-certification due process protections in several decisions. The California Supreme Court, in *Conservatorship of Roulet*,[30] established the standard of proof beyond a reasonable doubt and a unanimous jury verdict for post-certification conservatorship hearings for the gravely disabled. In *Conservatorship of Chambers*,[31] the California Court of Appeal rejected an attack on the vagueness of the grave disability standard for commitment. The court declared that the standard was neither unconstitutionally broad nor vague.

The California court decisions reflect the same judicial concerns the federal courts have had about the loss of liberty and the risk of error attached to mental commitment. In *People v. Burnick*[32] and *Roulet* the California Supreme Court stressed the inherent unreliability of psychiatric predictions and the possibility of error in those predictions. The court's concern served as its rationale for requiring proof beyond a

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Supp. 1982); 2) the imminently suicidal—fourteen day extensions with no review, *Id.* at §§ 5260-64; 3) the gravely disabled—thirty day temporary conservatorships (effected ex parte) without mandatory review, *Id.* at § 5352.1, or a one year conservatorship with mandatory review, *Id.* at § 5361.

30. 23 Cal. 3d 219, 590 P.2d 1, 152 Cal. Rptr. 425 (1979). This decision placed conservatorship standards in line with the proof standards set by the California Supreme Court in People v. Thomas, 19 Cal. 3d 630, 566 P.2d 228, 139 Cal. Rptr. 594 (1977) (narcotics addicts); People v. Feagley, 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975) (mentally disordered sex offenders).

31. 71 Cal. App. 3d 277, 139 Cal. Rptr. 357 (1977).

32. 14 Cal. 3d 306, 327, 535 P.2d 352, 366, 121 Cal. Rptr. 488, 502 (1975).

reasonable doubt at LPS mandated hearings.

The only California decisions which address the certification period are *Thorn v. Superior Court*[33] and *County of San Diego v. Superior Court.*[34] In *Thorn,* the supreme court granted a non-profit corporation, established to provide a legal service, access to the Thorn psychiatric hospitals during the fourteen day intensive treatment period; however, the court's refusal to mandate a right to counsel during this period as a solution to due process problems limited the effectiveness of the availability of counsel to patients confined for intensive treatment. The court did acknowledge the problems inherent in a commitment scheme that relies on staff to outline habeas corpus rights to patients, who are often drugged or otherwise incapacitated.[35]

In *County of San Diego v. Superior Court,*[36] the companion case to *Thorn,* the supreme court rejected a patient's claim that the fourteen day certification without prior notice, court hearings, or advisement as to right to counsel violated due process. The court, referring to *Thorn,* noted that the act had been amended to inform a certified patient of his right to counsel.[37] The California courts thus avoided any in-depth constitutional analysis of the procedural safeguards during the certification period; yet, seventeen days can have the subjective impact of seventeen years for one who is incarcerated involuntarily in an institution that is similar to a prison. The legislature should provide some form of mandatory judicial review or procedural protection during this period to prevent the unconstitutional deprivation of an individual's due process rights.

## III. *Doe v. Gallinot* and *Suzuki v. Yuen:* THE FEDERAL COURTS EVALUATE COMMITMENT STATUTES

### A. *Doe v. Gallinot*

#### 1. *Background*

The swiftness with which one can be drawn into the

33. 1 Cal. 3d 666, 464 P.2d 56, 83 Cal. Rptr. 600. *See supra* note 23.
34. 1 Cal. 3d 677, 464 P.2d 63, 83 Cal. Rptr. 607 (1970).
35. 1 Cal. 3d at 675, 464 P.2d at 56, 83 Cal. Rptr. at 600.
36. 1 Cal. 3d 677, 464 P.2d 63, 83 Cal. Rptr. 607.
37. *Id.* at 678, 464 P.2d at 64, 83 Cal. Rptr. at 608.

"folds" of protective custody is aptly demonstrated by the experience of "John Doe" as outlined by the district court in *Doe v. Gallinot*.[38]

> Feburary 27: Upon receiving a complaint of a vehicle blocking a driveway, Police Officer Gallinot arrived at a hospital parking lot where he observed the plaintiff acting "shy and apprehensive." As a result of Doe's disoriented behavior and speech, Gallinot determined that he was unable to care for himself. He transferred Doe to a medical facility where he was interviewed in the police officer's car by a psychiatric nurse. The nurse authorized Doe for 72-hour detention, basing the determination on her opinion that the plaintiff was delusional, confused, and potentially explosive. Doe was then placed in restraints and driven by ambulance to nearby Camarillo hospital where within one hour he received intramuscularly 120 mg. of thorzane, 4 mg. of stelazine and 1 1/150 gr. of hyocene. Doe was admitted to Camarillo as gravely disabled. At no time prior to his detention was there an investigation of his ability to care for himself.
> March 4: Doe was certified for 14 more days of treatment as gravely disabled. At this time he requested a habeas corpus hearing.
> March 7: Doe's medication was augmented with 5 mgs. of haldol given intramuscularly every hour. Doe requested a change in his treatment but the request was disregarded. Doe's hearing pursuant to his request for judicial review by habeas corpus occurred that day. At the hearing he asked for a private attorney. The hearing on his petition was continued to March 11 in order for Doe to secure private counsel. Doe appeared to be heavily sedated and the defense attorney requested that his dosage be lowered for the hearing. This request was ignored.
> March 11: Doe appeared with his private counsel and was granted his petition for writ of habeas corpus because the court found him not to be gravely disabled. He was released from Camarillo 14 days after his initial contact.[39]

Within an hour, diagnosis of John Doe's behavior was changed from "shy and apprehensive" to "potentially explosive," and he was committed as "gravely disabled." The statutory definition of commitment for grave disability is "a condi-

38. 486 F. Supp. 983, 990-94. *See supra* note 8.
39. *Id.* at 986-87.

tion in which a person, as a result of a mental disorder, is unable to provide for his basic personal needs, for food, clothing, or shelter."[40] Yet no investigation was made of Doe's ability to care for himself, and he had committed no overt act. Furthermore, he was given *no* due process protection prior to the seventy-two hour detention, and no one was available to determine that, in fact, his commitment was not based on a definable statutory standard.

The plaintiff in *Doe v. Gallinot* (hereinafter *Doe I*) challenged several provisions of the LPS. He charged first, that under the due process clause the standard of grave disability is unconstitutionally vague and that second, the statute under sections 5250-5252 does not provide minimum due process protections for persons involuntarily confined as gravely disabled.[41] The district court denied the first charge that grave disability as a standard for commitment is unconstitutionally vague. The court, however, in response to the second charge, ruled that due process requires a mandatory probable cause hearing for the gravely disabled prior to fourteen day certification, basing its conclusion in part on the high degree of subjectivity involved in interpreting the grave disability standard.[42] The district court decision was affirmed by the Ninth Circuit Court of Appeals.

While significantly improving procedural due process protections for the gravely disabled, the holding raises a special equal protection question with reference to persons considered dangerous to themselves or others who do not receive the mandatory probable cause hearing prior to fourteen day certification. Moreover, the court did not find the grave disability standard unconstitutional; yet there are strong arguments that the statute is vague and that, at the present time, it is being used in an overly broad manner. Finally, the facts in *Doe* raise an issue, as yet unaddressed by the California Legislature: whether there is a right to counsel during the evaluation-certification period.

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40. CAL. WELF. & INST. CODE § 5008(h) (West 1972 & Supp. 1982).

41. 486 F. Supp. at 984.

42. *Id.* at 984-85, 992.

2. *Due Process and the Right to a Mandatory Hearing within Seventy-two Hours of Confinement*

While the facts outlined in *Doe I* illustrate the ease with which one can be placed under protective custody, the court's analysis of Doe's situation during the time he was at Camarillo reflects the procedural due process deficiencies that occur during evaluation and treatment. First, the burden of contesting fourteen day certification rests on the patient who may be, as was Doe, heavily drugged. Second, Doe had to rely on staff or other employees to explain his habeas corpus rights. The court found that although the statute requires that the staff thoroughly explain the term "habeas corpus,"[43] administrative directives failed to define the term to the staff. Third, no written guidelines were followed in administering medication. Finally, forensic staff members with little or no knowledge of the particular case testified at the habeas corpus hearing where, as the court stated, "the vast majority of patients are under medication . . . a condition which inhibits their ability to participate in the proceedings."[44]

In addition to the procedural deficiencies, the court was concerned with what it perceived as a substantial risk of error in applying the grave disability standard.[45] In light of the procedural deficiencies and the risk of error, the court concluded that there must be a mandatory post seventy-two hour probable cause hearing for the gravely disabled. The court noted that a probable cause hearing need not be conducted by a judicial officer as long as it was conducted by a "person or group of persons independent of the mental hospital."[46]

The Ninth Circuit Court affirmed the district court decision in *Doe v. Gallinot* (hereinafter *Doe II*).[47] The *Doe II* court, with reasoning similar to that of the district court, grounded its decision on the failure of LPS to satisfy minimum requirements of due process, thereby implicating "an important, constitutionally protected liberty interest of the

43. 486 F. Supp. at 988; CAL. WELF. & INST. CODE § 5252.1 (West 1972 & Supp. 1982).

44. 486 F. Supp. at 989.

45. *Id.* at 989, 991.

46. *Id.* at 994. The court referred to Doremus v. Farrel, 407 F. Supp. 509 (D. Neb. 1975) (due process does not mandate a judicial hearing for involuntary civil commitments).

47. 657 F.2d 1017 (9th Cir. 1981).

person committed."[48] The court agreed with the district court's conclusion that habeas corpus review on demand did not adequately protect against erroneous fourteen day certification.[49]

The court followed the United States Supreme Court's analysis in *Parham v. J.R.*[50] in testing the challenged state procedures. In *Parham,* the Court rejected district court-ordered hearings for minors prior to commitment. The Court held, instead, that there must be some kind of inquiry by a neutral factfinder "to determine whether the statutory requirements for admission are satisfied."[51] In reaching this conclusion, the *Parham* Court balanced the following factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirement would entail.[52]

Following this analysis, the *Doe II* court found that there was a substantial private interest at stake because of "the massive curtailment of liberty" and the "adverse social consequences" resulting from commitment.[53]

In applying the second prong of the *Parham* test, the court agreed with the district court's finding "that commitment decisions under the LPS Act are highly error-prone especially where review of those decisions depended on the initiative and competence of the persons committed."[54] Moreover, the court found convincing the district court's statistical analysis showing that of those detainees who obtained habeas corpus review, "a significant number were discharged at or before a hearing."[55]

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48. *Id.* at 4864. The district court gave defendants a chance to develop a satisfactory program, but their efforts were unsuccessful. Legislation they drafted failed to pass both houses of the state legislature and other efforts have also failed. *Id.*

49. *Id.* at 4865.

50. 442 U.S. 584 (1979).

51. *Id.* at 608.

52. *Id.* at 599 (quoting Matthews v. Eldridge, 424 U.S. 319, 335 (1976)).

53. No. 80-5658 at 4866 (quoting Vitek v. Jones, 445 U.S. at 491-92).

54. *Id.* at 4866 (quoting Doe v. Gallinot, 486 F. Supp. at 989-90).

55. *Id.* (quoting 445 F. Supp. at 989-90). The *Doe I* court analyzed statistics

Finally, with respect to the government's interest, the court rejected the state's argument that mandatory hearings would unduly burden physicians and psychiatrists who would be testifying, and stated that such conclusions were merely hypothetical.[56] The court noted, as did the district court, that these procedures need not be conducted by a judge or judicial officer. The *Doe II* court, however, substantially undermined the district court decision by stating that a decision-maker from within the hospital would suffice,[57] overlooking the district court's statement that the hearings must be conducted by "a person or persons independent of the mental hospital."[58] The court thus opened the door to hearings conducted by specialists employed by the hospital.

The *Doe II* court, in stating that institutional factfinders would suffice, referred to the Supreme Court's conclusion in both *Parham* and *Vitek v. Jones*.[59] In *Parham*, the Court rejected any kind of third-party analysis, stating that psychiatrists were the best qualified to serve as neutral factfinders:

> Although we acknowledge the fallibility of medical and psychiatric diagnosis [citation omitted], we do not accept the notion that the shortcomings of specialists can always be avoided by shifting the decision from a trained specialist using the tools of medicine and science to an untrained judge or administrative hearing officer . . . .[60]

The *Parham* Court assumed that the psychiatrist would "sort medically relevant facts," sense "motivational nuances" on the part of parents, and "thoroughly investigate" the situation.[61]

The state should opt in favor of an entirely neutral factfinder, for empirical evidence clearly indicates that psychiatrists tend to err on the side of commitment.[62] Justice Brennan's dissent in *Parham* emphasized this problem. He stated

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from Camarillo State Hospital for 1975 and 1976 and from Los Angeles County for 1975.

56. *Id.* at 4867.

57. *Id.*

58. 486 F. Supp. at 994.

59. 445 U.S. at 496.

60. 442 U.S. at 609.

61. *Id.* at 611-13.

62. *See*, Rosenhan, *supra* note 3; See also *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1240-45 (1972) [hereinafter *Civil Commitment*].

that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." As Justice Brennan suggests, a factfinder with ties and loyalties to the institution he represents is more likely to defer to the conclusions and records of the institutional staff without sufficient objective analysis. While full-blown hearings may not be constitutionally mandated, hearings conducted by persons independent of the institution will understandably provide better due process protection for the patient.

### 3. *Mandatory Hearings and the Need for Uniformity*

While resolving some due process problems, the establishment of mandatory probable cause hearings for the gravely disabled raises special equal-protection problems. In *Jackson v. Indiana,*[63] the United States Supreme Court held that an Indiana statutory procedure for civil commitment of an individual, who was charged with a crime but deemed incompetent to stand trial, denied him his right to equal protection under the law. The statutes subjected the plaintiff to more lenient commitment standards and more stringent release standards than those used for civil commitment of individuals not charged with offenses.[64]

The California Supreme Court has applied a strict scrutiny test when it analyzed statutory disparities with respect to civil commitments. In *Roulet,* the supreme court held that there was no compelling state interest for differentiating between the gravely disabled and the imminently dangerous when requiring a unanimous jury verdict prior to long-term conduct.[65] Likewise, a compelling state interest should be required to justify the unequal treatment of those dangerous to themselves or others with respect to *Doe* mandated probable cause hearings. At the present time, these individuals must wait seventeen days for a hearing after the staff apprises them of their rights, unless they request a habeas corpus hearing. Furthermore, dangerousness should not be considered a compelling reason because of the recognized inconsistency of psychiatric predictions and because the hearing is only a protection for the patient and does not guarantee his or her release.

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63. 406 U.S. 715 (1972).
64. *Id.* at 720-21, 730.
65. 23 Cal. 3d at 230-31, 590 P.2d at 7-8, 152 Cal. Rptr. at 431-32.

There are compelling reasons for the state to apply *consistent* standards for all categories of the allegedly mentally ill. First, the fact that one category now receives mandatory hearings enhances the possibility that the staff will change the status of the patient during the evaluation period from gravely disabled to dangerous to himself or others in order to avoid these hearings.[66] Second, those categorized as dangerous to themselves or others face the same procedural due process deficiencies described by the courts in *Doe I* and *Doe II* and by the supreme court in *Thorn*.[67] Each court expressed concern about a plaintiff who, often under heavy medication, must rely on the staff to apprise him of his habeas corpus rights. As the *Doe II* court stated:

> No matter how elaborate and accurate the habeas corpus hearings available under the LPS Act may be once undertaken, their protection is illusory when a large segment of the protected class cannot realistically be expected to set the proceedings into motion in the first place. . . . Indeed, the irony of the appellants' argument is that the more accurate the determination of the statutory habeas corpus proceedings may be, the more irrational it is to afford those proceedings only to those in a position to request them.[68]

One county now holding *Doe* mandated probable cause hearings for the gravely disabled reports a significant rise in the number of habeas corpus requests as a result of these hearings.[69] The hearing officer in this county informs the patient of his right to a habeas corpus hearing at the end of his court appearance. Thus, it may be concluded that a mandatory probable cause hearing for all categories of mental commitment is necessary to safeguard due process rights.

Third, the same stigma attaches to the allegedly dangerous individual as to the gravely disabled person. Chief Justice Bird in *Roulet* noted that society still views the mentally-ill person with suspicion. "[T]he former mental patient is likely

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66. A Santa Clara County public defender noted that at least one treatment hospital is combining the grave disability and dangerousness categories to avoid the mandatory hearings.

67. Doe v. Gallinot, 486 F. Supp. at 988-89; Thorn v. Superior Court, 1 Cal. 3d at 666, 675, 464 P.2d at 56, 62, 83 Cal. Rptr. at 600, 606.

68. 657 F.2d at 1023.

69. Conversations with Santa Clara County public defender in January of 1981.

to be treated with distrust and even loathing; he may be socially ostracized and victimized by employment and educational discrimination. . . ."[70] Although the supreme court's concern was directed at the stigma and loss of self-esteem resulting from post-certification confinement of the gravely disabled, the same stigma attaches to anyone categorized as mentally ill regardless of how short the period of confinement. In *Gerstein v. Pugh*,[71] the Supreme Court mandated probable cause hearings promptly after arrest for those arrested without a warrant. The Court, using an analysis similar to Justice Bird's stated that "pretrial confinement may imperil the suspect's job [and] interrupt his source of income. . . . When the stakes are this high, the detached judgment of a neutral magistrate is essential . . . to furnish meaningful protection from unfounded interference with liberty."[72] In the civil commitment proceeding, mandatory probable cause hearings within seventeen hours of confinement will not guarantee release, but will give each individual the opportunity to expose and have rectified a possibly damaging mistake in diagnosis.

Finally, mandatory hearings for all categories of mental commitment would make LPS consistent with many recent decisions where the courts have balanced the state's need for commitment against the concurrent stigma and loss of freedom that result from commitment, and have tipped the scale in favor of mandatory hearings at an early stage of the process.[73] In *Lessard v. Schmidt*,[74] the court noted:

> It must be remembered that at this time [the initial detention stage] the necessity for commitment of an individual has not yet been established. Those who argue that notice and a hearing at this time may be harmful to the patient ignore the fact that there has been no finding that the person is in need of hospitalization. The argument also ignores the fact that even a short detention in a

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70. 23 Cal. 3d at 229, 590 P.2d at 7, 152 Cal. Rptr. at 431.

71. 420 U.S. 103 (1975).

72. *Id.* at 114.

73. Suzuki v. Quisenberry, 411 F. Supp. 1113 (hearings within 48 hours) (D. Hawaii 1976); Lessard v. Schmidt, 413 F. Supp. 1318 (48 hours); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974) (seven days); Doremus v. Farrell, 407 F. Supp. 509 (D. Neb. 1975) (five days); *contra* Coll v. Hyland, 411 F. Supp. 905, (D. N.J. 1976) (920 days); Fhagen v. Miller, 306 F. Supp. 364 (S.D. N.Y. 1969) (up to 30 days before hearing).

74. 413 F. Supp. 1318.

> mental facility may have long lasting effects on the individual's ability to function in the outside world due to the stigma attached to mental illness.[75]

If, as the *Doe I* court stated, "[d]ue process is safeguarded only by a hearing,"[76] it follows that the due process rights of all allegedly mentally ill persons should be safeguarded by a hearing.

4. *Grave Disability: A Statutory Standard that Allows Due Process Violations at the Initial Stage of Commitment*

The court in *Doe I* held that the grave disability term was sufficiently precise. The court found that grave disability implicitly required a finding of harm to oneself, i.e. an inability to provide for one's basic physical needs, and therefore met the constitutional requirement of dangerousness.[77] According to the court, this standard was much more specific than others that federal courts have found to be unconstitutionally vague. The standards challenged in other cases allowed commitment based upon a finding that a person was mentally ill and either needed or would benefit from treatment.[78] The court ignored the fact that Doe himself was involuntarily committed without any investigation of his ability to provide food, clothing or shelter for himself. The court, however, did recognize that "well-intentioned persons might find that certain standards of food, clothing and shelter are basic even though failure to meet them does not harm or endanger a person sufficiently to justify commitment."[79]

Despite the *Doe I* court's conclusion, there are good indications that the grave disability standard is vague and overbroad and that the standard does fall within the "vast uncontoured description of mental ills" that other courts have rendered unconstitutional.[80] While vagueness refers to the specificity of a statute, overbreadth refers to the reach. A statute with a measure of specificity could be deemed overly broad if, in fact, it prohibits or chills constitutionally pro-

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75. 349 F. Supp. at 1091 nn.17 & 18.
76. 486 F. Supp. at 994.
77. *Id.* at 991.
78. *Id.*
79. *Id.*
80. *Id.* (quoting Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085, 1096 (E.D. Mich. 1974)).

tected behavior.[81] The California standard fails to meet either test.

As the *Doe I* court stated, the vagueness of the standard lends itself to possible interpretations that do not come within constitutional limits.[82] In fact, the standard "was intentionally vague in order to provide . . . services to individuals who were incompetent to function independently."[83]

Due process requires that statutes provide fair warning to individuals and that they be specific enough to prevent arbitrary enforcement.[84] Although the vagueness standard is generally applied to criminal statutes, the Supreme Court has pointedly stated that due process rights are not controlled by the type of proceeding.[85] Justice Black, in *Giaccio v. Pennsylvania*,[86] stated that a statute fails to meet the requirement of the due process clause in civil proceedings if it "is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide without any legally fixed standards what is prohibited and what is not in each particular case."[87] In the habeas corpus hearings monitored in a recent study by Carol Warren, the most common criteria for commitment of the gravely disabled was prior hospitalization (70%), with failure to take medication the second most common criteria (45%).[88] The gravely disabled standard is so vague that it does not provide the "legally fixed standards" necessary to satisfy the requirement of due process. The fact that the police officer in *Doe* decided

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81. *See* Grayned v. City of Rockford, 408 U.S. 104, 114 (1972).

82. 486 F. Supp. at 991.

83. ENKI, *supra* note 21, at 228.

84. *See* Grayned v. City of Rockford, 408 U.S. 104 (1972). The Court in *Grayned* cited three important harms a vague statute may cause: 1) It may trap the innocent by not providing fair warning, 2) It delegates basic policy matters to policemen, judges and juries on an *ad hoc* basis, and 3) It may cause people "to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden area were clearly marked." *Id.* at 108-09.

85. *See* In Re Winship, 397 U.S. 358, 365-66 (1970). In *Winship* the court refused to allow the state's civil labels and good intentions to obviate the need for criminal due process safeguards. *See also* In Re Gault, 387 U.S. 1, 49-50 (1967).

86. 382 U.S. 399 (1966).

87. *Id.* at 402-03. *See also* A.B. Small Co. v. American Sugar Co., 267 U.S. 233, 239-42 (1924); Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10, 17-19 (S.D. Iowa 1975); Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

88. Warren, *Involuntary Commitment for Mental Disorder: The Application of California's Lanterman-Petris-Short Act*, 11 LAW & SOC'Y REV. 629, 634 (Sept. 1977).

that the plaintiff's behavior fell within the statutory standard further exemplifies the problems inherent in such a subjective standard.[89] John Doe was "shy and apprehensive," thirty minutes later he was extremely delusional and paranoid.[90] As a result, he was deemed to be gravely disabled and the net swept him into the system under a statutory requirement of inability to provide food, clothing, or shelter. Doe was, in fact, self-employed, managing two apartment buildings in Los Angeles. He was capable of obtaining private medical assistance, his closets housed sufficient amounts of clothing and he was able to provide food for his nourishment.[91]

If the people who engage in lawful, protected behavior, albeit eccentric or strange, are being penalized because of this behavior, the statute is in danger of encouraging detention of those who maintain unusual life styles. The right to choose and practice a particular life style is protected by the first amendment rights of association, assembly, and free expression. The Supreme Court, in *Addington v. Texas*,[92] noted that risking the loss of liberty on the basis of unusual conduct must be avoided, for "loss of liberty calls for a showing that that individual suffers from something more serious than is demonstrated by idiosyncratic behavior."[93] Warren's study indicated that, in fact, the California statute is penalizing those who demonstrate "idiosyncratic behavior." The author found that nonstatutory violations of folkways (wearing bizarre dress, being transient, having a dirty home, etc.) were common criteria for the initial commitment under a grave disability standard.[94] Furthermore, these patterns of behavior were those most frequently used as evidence of failure to provide food, clothing, or shelter at subsequent habeas corpus hearings.[95] This broad use of the gravely disabled category can be

89. In a deposition, Officer Gallinot stated that he felt that grave disability included "a combination of endangerment to himself and endangerment to others in that he [mental patient] wasn't able to care for himself mentally or emotionally." Brief for plaintiff, at 99, Doe v. Gallinot, 486 F. Supp. 984 (citing deposition of Gary Gallinot at 14-15 (filed 6-13-78)).

90. 486 F. Supp. at 986-87.

91. *See* brief for plaintiff at 108, 486 F. Supp. 984.

92. 441 U.S. 427 (1979).

93. 441 U.S. at 427. *See also* Bruns v. Pomerleau, 319 F. Supp. 58 (D. Md. 1970) (an officer may not penalize an individual for engaging in nonconformist activity).

94. Warren, *supra* note 88, at 633.

95. *Id.* at 638.

analogized to the ordinance and vagrancy statutes that the Supreme Court deemed to be unconstitutionally vague and broad.[96] Justice Douglas, in discussing the Jacksonville City vagrancy ordinance, stated:

> Those generally implicated by the imprecise terms of the ordinance—poor people, nonconformists, dissenters, idlers—may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts. Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law.[97]

Several studies have indicated that the vagueness of the gravely disabled standard has allowed it to be used as a possible escape hatch to prolong institutional confinement.[98] Patients, originally committed as dangerous, who become less dangerous after seventy-two hours because of tranquilizing medicines, often have their status changed to the less demanding standard of gravely disabled. In Warren's study, only 11% of the patients were admitted as gravely disabled. By the time of the habeas corpus hearings, however, 52% had "become" gravely disabled.[99]

Due to the problems caused by the vagueness of the grave disability standard, the legislature should consider eliminating it as a category for involuntary commitments. In fact, most recent court decisions have invalidated similarly vague standards on grounds of vagueness and overbreadth.[100] Of these

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96. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (statute prohibiting common night walkers); Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965) (unlawful to stand, loiter or walk upon any street or sidewalk so as to obstruct free passage); Thornhill v. Alabama, 310 U.S. 88 (1940).

97. 405 U.S. at 170-71.

98. *See* Morris, *Conservatorship for the Gravely Disabled, California's Nondeclaration of Nonindependence*, 15 SAN DIEGO L. REV. 201 (1978); *See also* ENKI, *supra* note 21, at 155 (results of this study indicated grave disability was being used as a catch-all for patients that could not be held under a stricter definition); *cf.* Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers*, 3 CRIM. L. BULL. 205, 219, 226 (1967) (vagrancy legislation is not essentially aimed at the prohibiton of any specific act; it is purposefully made "obscure to serve the function of a catch all. . .").

99. Warren, *supra* note 88, at 645.

100. *See, e.g.*, Doremus v. Farrell, 407 F. Supp. 509 (D. Neb. 1975) (statute unconstitutionally vague, overbroad, and violative of due process of law); Stamus v. Leonhardt, 414 F. Supp. 439 (S.D. Iowa 1976) (law allowing commitment on showing

decisions, the one having the greatest implication for California is *Suzuki v. Yuen.*[101]

## B. *Suzuki v. Yuen: A Higher Standard for Involuntary Commitments*

### 1. *Background*

*Suzuki v. Yuen* is the last of three decisions in which Hawaii's mental health statutes were evaluated. In *Suzuki v. Quisenberry,*[102] the first of the trilogy, three plaintiffs who had been involuntarily detained under Hawaii's mental health statute sought a declaratory judgment that certain provisions of Hawaii's mental health statute were unconstitutional and an injunction against the use of the nonconsensual provisions of the statute. The district court declared that certain nonconsensual, non-emergency provisions of the statute were unconstitutional. The court retained jurisdiction of the case pending legislative amendment. The court did find the emergency provisions in the Hawaii statute constitutional in that they limited detention to a person who posed an immediate threat to himself or others as evidenced by a recent overt act.[103] Additionally, the emergency statute allowed only fourty-eight hours of commitment before a mandatory hearing. In *Suzuki v. Alba,*[104] the court declared certain parts of the amended statute unconstitutional. The court held that 1) in both emergency and non-emergency situations, the state can not involuntarily commit one who is dangerous only to property,[105] 2) in a non-emergency situation, the state cannot involuntarily commit one up to five days for evaluation because this procedure violates the fifth amendment's privilege

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of mental illness and "best interest" of the individual is too imprecise); Kendall v. True, 391 F. Supp. 413 (W.D. Ky. 1975) (statute unconstitutionally vague for failure to require a finding of dangerousness); Bell v. Wayne County General Hospital at Eloise, 384 F. Supp. 1085 (E.D. Mich. 1974) (statute vague and overbroad because it lacked the requisite element of dangerousness) *relying on* Humphry v. Cady, 405 U.S. 504 (1972).

101. 617 F.2d 173 (9th Cir. 1980).

102. 411 F. Supp. 1113.

103. *Id.* at 1119, 1125. The Hawaii definition of dangerousness specifies that dangerousness must be "evidenced by an act, attempt or threat." HAWAII REV. STAT. § 334-1 (1976). California's statute has no such definition of dangerousness.

104. 438 F. Supp. 1106 (D. Hawaii 1977).

105. *Id.* at 1109-10.

against self-incrimination,[106] 3) in a non-emergency commitment the state must prove beyond a reasonable doubt that the person needs commitment before there can be a five-day evaluation,[107] and 4) in non-emergency, non-consensual commitment, the Hawaii statute unconstitutionally failed to require a finding of imminent and substantial danger as evidenced by a recent overt act, attempt or threat.[108]

In *Suzuki v. Yuen,*[109] the Ninth Circuit issued a four-part decision, affirming in part and reversing in part, the lower court's decision in *Alba.* The court concluded that the present statute's provision for commitment of a person dangerous to property and its failure to require showing of imminent danger before commitment was unconstitutional.[110] Contrary to the district court's ruling, the court held that the statute did not deprive persons of their privilege against self-incrimination and that the state need not establish the elements of commitment beyond a reasonable doubt.[111]

### 2. *Impact of Suzuki v. Yuen on California's Commitment Statute*

The Ninth Circuit concluded that the state must find a threat of imminent danger to oneself or others as evidenced by a recent overt act. This has serious implications for California law. Since LPS does not have the same requirement, the statute is unconstitutional. Commitment exclusively on the basis of grave disability does not meet the *Yuen* standard.[112] In light of this Ninth Circuit decision, the California Legislature will need to reconsider the continuing use of grave disability as a standard for commitment.

The *Yuen* court's requirement of imminent dangerousness reflects the recent increase in procedural protections at *all* stages of the commitment process. This requirement is not reflected in California law. Section 5150 of LPS allows commitment of a person who is gravely disabled or dangerous to himself or others. Because the section does not include the

106. *Id.* at 1111-12.
107. *Id.* at 1111.
108. *Id.* at 1110.
109. 617 F.2d 173 (9th Cir. 1980).
110. *Id.* at 174.
111. *Id.*
112. *See supra* notes 109-11 and accompanying text.

critical terms "a finding of imminent danger as evidenced by a recent overt act, attempt or threat," it clearly does not reach the standard set forth in *Yuen* for all categories of committed individuals.

Grave disability does not include an element of impending dangerousness. As a result, this part of the statute should either be deleted or redefined. Failure to provide food, clothing, or shelter is the requisite standard for grave disability. The additional requirement in *Yuen* of an overt act, attempt, or threat implies aggressive behavior.[113]

The *Doe* court stated that commitment statutes are unconstitutional unless there is a finding of dangerousness. The court relied on *Suzuki v. Quisenberry* to support its position.[114] The decision in *Suzuki v. Alba* in which the Hawaii court held that the dangerousness standard for civil commitments must include a finding of imminent dangerousness and a recent overt act was overlooked or ignored.[115] This omission may be the reason why the court failed to more carefully scrutinize the grave disability standard.

The *Yuen* standard affords greater protection for those who exhibit eccentric behavior or lifestyles. Police officers can more readily assess behavior that is overtly dangerous. Families will be informed that mere intractability is insufficient to commit an individual. Mentally ill persons who pose no immediate threat to themselves or to others, should be allowed to move about freely and should be encouraged to obtain voluntary outpatient care. Application of a commitment standard that is dangerously vague and overbroad is "tantamount to condoning the state's commitment of persons deemed socially unacceptable for the purpose of indoctrination or conforming the individual's beliefs to the beliefs of the state."[116] The *Yuen* standard is a common-sense solution to the current inadequacies of the California statute.

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113. *See* Wexler, *Comments and Questions about Mental Health Law in Hawaii*, HAWAII B. J., Winter 1978, at 5. Wexler suggests that the dangerousness standard in *Suzuki* implies affirmative behavior. *See also Overt Dangerous Behavior as a Constitutional Requirement for Involuntary Commitment*, 44 U. CHI. L. REV. 562 (1976-1977). The author's examples of overt behavior include: slitting wrists, brandishing a knife and not eating for several days.

114. 486 F. Supp. at 991.

115. 438 F. Supp. at 1110. The *Doe* court denied, without prejudice, plaintiff's motion to reconsider grave disability in light of *Suzuki v. Yuen*.

116. Doremus v. Farrell, 407 F. Supp. 509, 514.

## IV. Right to Counsel During the Evaluation-Certification Period

A mandatory right to counsel is essential at the earliest stages of the commitment process for several reasons. First, a patient's right to a habeas corpus hearing is jeopardized when he must rely on staff to apprise him of this right. Second, the patient needs the guidance of counsel to ensure that his right to adequate treatment is protected. Third, the patient is subjected to a potentially coercive psychiatric examination without any procedural protection and the conclusions drawn by the psychiatrist are frequently the sole criteria used for further commitment. It is, therefore, clear that counsel should be available to the patient, to advise him and to negotiate on his behalf if necessary. Counsel could include the use of attorney-supervised paralegals serving as patient's advocates. The essential element is representation that is separate from and independent of the mental health system.

### A. *Counsel at the Earliest Stage of Commitment*

The patient in California may request counsel at the time he receives notice of fourteen day certification. No California court to date has effectively challenged this system. In *Thorn*, the court mentioned the possible role conflict arising from entrusting notice and explanation of rights to the same agency that undertakes to perform the therapeutic function.[117] Under the present system, staff members, who themselves may not understand the basis for the habeas corpus right, are responsible for communicating this important information to the patient. At the least, mandatory counsel should be appointed at this stage of the commitment process.

A more efficient solution to the dilemma would be assignment of counsel or counsel-supervised independent advocates to the patient upon arrival at a hosptial. An independent advocate would be an important source for the patient with respect to apprising him of his rights. The advocate could also monitor any change of status during evaluation. Until mandatory hearings are provided for all mentally ill patients, the presence of an advocate is especially important to see that the patient's diagnosis is not changed simply to avoid

117. 1 Cal. 3d at 675, 464 P.2d at 62, 83 Cal. Rptr. at 606.

mandatory probable cause hearings for the gravely disabled. Additionally, extending this protection to the earliest stages of commitment would stabilize a force that may work against the patient's best interest: the psychiatric evaluation.

### B. *Treatment: Assistance of Counsel in Choice of Treatment*

Within one hour of his confinement, plaintiff Doe was given heavy doses of psychotropic drugs, chemical agents used to manage and treat serious mental illness. Doe's only statutory right with respect to treatment was the right to refuse electro-shock therapy and lobotomy.[118] Doe wanted a change in treatment, however, his request was ignored. Additionally, the court reported that no administrative guidelines with respect to treatment were followed.[119] If, at this point, Doe could have availed himself of counsel, a treatment plan developed to meet his individual needs and designed to rehabilitate rather than domesticate could have been assured. Moreover, a state legislative study indicated that patients in California are receiving too much drug medication. The study established that only 56% of the psychiatrists and 26% of the nursing staff in twenty-five facilities informed patients about medications. A significant number (23%) of the patients received unwanted treatment.[120] Because psychotropic drugs can have long-term effects on the patient and can seriously affect his ability to make rational decisions, the availability of counsel or other persons who can negotiate on the patient's behalf is essential at the earliest stages of confinement.

Counsel could additionally facilitate a better relationship between the patient and the hospital staff. The line between voluntarily accepted treatment and coerced treatment is very narrow. Stress resulting from forced or coerced medication might result in total rejection of medication after release. In California, there is an additional coercive element because the

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118. CAL. WELF. & INST. CODE § 5325.1 (West 1972 & Supp. 1982).

119. 486 F. Supp. at 988.

120. CALIFORNIA LEGISLATURE, ASSEMBLY OFFICE OF RESEARCH, THE USE AND MISUSE OF PSYCHIATRIC DRUGS IN CALIFORNIA'S MENTAL HEALTH PROGRAMS, 9, 36 (June 1977). *See also* Rennie v. Klein, 462 F. Supp. 1131, 1136-38 (D.N.J. 1978) (discussion of the effects of psychotropic drugs on patients); Plotkin, *Limiting the Therapeutic Orgy: Mental Patient's Right to Refuse Treatment*, NW. U.L. REV. 461 (1977).

term of commitment may be extended if the patient refuses treatment.[121] If the patient has reservations about treatment, third-party assistance independent of the hospital staff may make him feel more secure and facilitate a treatment decision that is in his best interests.[122]

### C. *Psychiatrists: Assistance of Counsel During Psychiatric Evaluation*

The validity of psychiatric prediction has been questioned increasingly by both psychiatrists and legal experts, yet psychiatrists remain an indispensable part of the evaluation process. In fact, the *Yuen* court premised its rejection of a fifth amendment right to silence on the conclusion that the person dangerous to himself or others must receive psychiatric evaluation.[123] The Supreme Court in *Addington* reflected the prevailing attitude when it stated: "Whether the individual is mentally ill and dangerous to himself or others turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists."[124]

By endorsing psychiatric predictions, the courts have ignored the lack of procedural protections for the involuntarily committed patient during the evaluation-certification period. The patient is denied both the right to counsel and a witness during any psychiatric interviews that occur. Yet there is evidence that psychiatrists, in addition to being ineffective predictors, ignore statutory criteria when evaluating patients.

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121. CAL. WELF. & INST. CODE § 5252.1 (West 1972 & Supp. 1982).

122. The right of a patient in non-emergency situations to refuse treatment has received consideration and acceptance in several judicial districts. The United States Supreme Court recently granted certiorari on this issue. *See* Rogers v. Okin, 634 F.2d 650 (1980), *cert. granted*, No. 80-1417. *See also* Scott v. Plante, 532 F.2d 939 (3d Cir. 1976) (forced medication interferes with first amendment right and the right to bodily privacy); Rennie v. Klein, 462 F. Supp. 1131 (D.N.J. 1978) (the right to privacy requires a hearing prior to the forced administration of drugs).

The California Constitution, art. I, § 1 guarantees to each citizen of the state an inalienable right to privacy. In recent legislation, the California Legislature affirmed this right for involuntarily committed individuals even at the "expense" of treatment. Section 5325.1 provides in part that the patient has a right to a course of treatment that is the least restrictive of his personal liberty, a right to dignity, privacy, and humane care, and a right to participate in community activities. CAL. WELF. & INST. CODE § 5325.1 (West 1972 & Supp. 1982).

123. 617 F.2d at 177. *See also* Trippett v. Maryland, 436 F.2d 1153, 1162 (4th Cir. 1971) (Sobeloff, Judge, concurring) (granting an individual a right to silence would thwart personal examinations and interviews considered indispensable).

124. 418 U.S. at 420. *See also* Parham v. J.R., 442 U.S. 584, 611-13 (1979).

Finally, the courts ignore the potentially damaging consequences of the use of a psychiatrist as a witness against his patient.

The psychiatric evaluation is crucial to all future commitment decisions; yet, there are no procedural safeguards during evaluation and no monitoring of the rationale for the evaluator's conclusions. Moreover, there is evidence that psychiatrists tend to overdiagnose mental illness to protect themselves from possible negative publicity.[125] Recent studies have indicated that psychiatrists are resisting or ignoring statutory commitment criteria. A Canadian study of commitments before and after higher standards for commitment were established indicates that mental states (paranoia, confusion), physical appearance, and prior hospitalization *still* received the most tallies from psychiatrists in involuntary commitment evaluations.[126] In the Warren study, an evaluation of factors influential in habeas corpus hearings showed that the most common criteria for commitment of the gravely disabled was prior hospitalization, failure to take medication, and the denial of illness.[127] These criteria have no relationship to the statutory standard of whether a patient has the ability to provide his or her basic needs.

Because counsel is not allowed at the psychiatric interview, there is little opportunity to expose the psychiatrist who consistently abuses or ignores the courts' established standards or to analyze effectively the criteria the psychiatrist used in reaching his conclusions.[128] This situation inhibits

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125. *Civil Commitment supra* note 62. *See also* Conservatorship of Roulet, 23 Cal. 3d 219, 230, 590 P.2d 1, 7, 152 Cal. Rptr. 424, 431 (1979) (discussing lack of consistency in psychiatric decisions and of the tendency to over-diagnose).

126. Page and Yates, *Civil Commitment and the Danger Mandate*, 18 CAN. PSYCHIATRIC A. J. 265, 268-69 (1973).

127. Warren, *supra* note 88, at 633-34.

128. *See* Comment, *Compulsory Counsel for California's New Mental Health Law*, 17 U.C.L.A. L. REV. 851, 862 (1970). *See also* In Re Spenser, 63 Cal. 2d 400, 412-13, 406 P.2d 33, 41-42, 46 Cal. Rptr. 753, 761-62 (1965). In a criminal prosecution, if the defendant raises insanity as a defense, a psychiatrist will be appointed to examine the defendant. In *Spenser* the California Supreme Court held that counsel for the defendant was not required at the psychiatric interview *if* certain safeguards were provided for the defendant. Before submitting to an examination the defendant must be represented by counsel or have knowingly and intelligently waived that right. His counsel must be informed of the appointment of a psychiatrist. Moreover, it is within the court's discretion to allow counsel or a defense psychiatrist to be present as an observer. *Id.* at 412, 406 P.2d at 41, 46 Cal. Rptr. at 761.

In the criminal prosecution, the defendant through his own volition has raised

meaningful evaluation of the examiner's conclusions in subsequent hearings. In LPS, the California Legislature provided that during court-ordered evaluations the patient may have relatives, friends, an attorney, a personal physician or other professional, or a religious advisor present if the patient so requests.[129] The provision indicates that the legislature believed that the presence of outside parties would not interfere with the purpose of the interview. The presence of friends, a personal physician, or other professionals would inhibit any tendency on the part of the psychiatrist to intimidate the patient. A more effective procedure would provide for the presence of counsel to monitor the conditions of the examination and ensure that due process was followed, and to obtain information to be used when representing the client in later hearings.

An additional reason for the presence of counsel at the psychiatric examination is that a forensic staff member with little or no knowledge of the particular case frequently testifies at the hearing solely on the basis of staff members' contact with the patients being reviewed.[130] Counsel that has observed the interview could more effectively evaluate this testimony. Ideally, a psychiatric interview should be a confidential experience between patient and physician. The therapeutic function of the psychiatrist is seriously jeopardized, however, when he is a potential witness against his patient.[131] This untenable situation can only lead to inevitable tension between the need of the psychiatrist to diagnose and treat effectively and the need and right of the patient to due process

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the insanity defense thereby implicitly requesting some type of psychiatric examination. In involuntary civil commitments there is no volitional act on the part of the patient. He must submit to a psychiatric evaluation and yet he is not accorded even minimal due process protections.

129. CAL. WELF. & INST. CODE § 5206 (West 1972 & Supp. 1982).

130. 486 F. Supp. at 989. *See also* CAL. EVID. CODE § 1004 (West 1972) (no psychotherapist-patient privilege in a commitment or guardianship hearing).

131. *See* CONSTITUTIONAL RIGHTS OF THE MENTALLY ILL, HEARINGS BEFORE THE SENATE SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 87th Cong., 1st Sess. and 88th Cong., 2nd Sess. (1961 and 1963) (statement of Thomas S. Szasz), *reprinted in* Katz, Goldstein, and Derschowitz, PSYCHOANALYSIS, PSYCHIATRY AND LAW 471, 472-73 (1967). If the psychiatrist is to assist the patient "to understand his aspirations and strategies . . . how can the psychiatric situation be used to curtail the patient's freedom . . . . The crucial issue is whether the psychiatrist is to be considered the agent of the patient or of someone else." *See also,* Headman, *The Psychiatrist as a Conservative Agent of Social Control,* 20 *Social Problems* 263, 263-71 (1972).

protections. An analysis of the effect of these tensions on subsequent treatment should be more carefully studied because the right to treatment is an important part of the commitment rationale.

A less effective but possible alternative to having counsel available at the interview would be documentation or possibly taping of the psychiatric examination. The documentation or taping would provide a record of the questions and the patient's responses. The record could then be reviewed and evaluated by a court and persons acting on behalf of the patient. The psychiatrist's current role as a predictor of dangerousness and/or disability is crucial to the patient's future commitments. As long as the psychiatrist retains this pivotal role in the commitment process, some provision should be made for monitoring that role.

## V. Suggestions for Changes in LPS Evaluation Procedures

The California Legislature should continue to narrow the road to involuntary commitment. In devising the new mental health act, the legislature has already attempted to decrease involuntary commitments. Although this objective has been partially achieved,[132] inequities in the statute remain, and the legislature should consider the necessary steps to reduce or eliminate these. First, the legislature should consider the inclusion of a finding of dangerousness, as evidenced by a recent overt act, in its standard for commitment of those alleged to be dangerous to themselves or others. Because the standard of grave disability does not include the requisite element of imminent dangerousness and because there is good indication that this standard is being applied in an unconstitutionally broad manner, the legislature should consider eliminating the grave disability standard for involuntary commitment. In addition to these changes in the commitment standards, alternatives to involuntary commitment of the acutely disabled should be considered. For the imminently dangerous and those deemed gravely disabled, a mandatory outpatient evaluation progam is a possible alternative to involuntary evaluation confinement.[133] This would support the deinstitutional-

132. ENKI, *supra* note 21, at 190-97.

133. *Id.* at 230-31. The ENKI report mentioned this alternative for those

ization goal of LPS. If the patient refused this option, he could then be involuntarily confined.

Concomitant with the concept of deinstitutionalization is the concept of adequate outpatient care. The need for more funding to provide better care was made drastically clear by the public reaction to the *Doe* decisions. Newspapers carried articles expressing alarm at the possibility of the "release" of gravely disabled mental patients as a result of a mandatory hearing.[134] This attitude undermines the goal of reducing involuntary commitments; however, it is true that many of these patients, if released, will receive inadequate outpatient care, if any. The lack of non-hospital acute and sub-acute twenty-four hour care facilities has been noted by a California Assembly Subcommittee.[135] Heightened legalistic reponse to due process inequities as seen in the *Doe* and *Yuen* decisions should obligate the state to seek adequate alternatives.

Second, the legislature should require the presence of mandatory counsel or a counsel-supervised negotiator at all stages of the commitment process to further enhance a patient's procedural due process protection. "Adequate" counsel is a serious issue with respect to commitments. Commentators have written extensively on inadequate representation of the mentally ill, in particular on the failure of counsel to adequately interview clients or assume an adversary role on their behalf during hearings.[136] The effective use of paralegals, possibly including former mental patients, to serve as advocates for the patient is a possible alternative to already overburdened public defender staffs. However, these advocates would need to work closely with attorneys.

California currently has a patient advocacy program.[137] The program provides that each county mental health direc-

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processed on a penal code violation who are LPS eligible.

134. Peninsula Times Tribune, Oct. 31, 1980, at 1, col. 1. In a front-page article, a veterans hospital official expressed concern about the release of patients who are not ready for release.

135. California Assembly Permanent Subcommittee on Mental Health and Development Disabilities, *Improving California's Mental Health System: A Framework for Public Contributions* (Sept. 30, 1977). Outpatient intervention often consists of only one hour a week of the client's time. *See also* ENKI, *supra* note 21, at 23.

136. *See* Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424 (1966). *See also How to Represent a Client Facing Civil Commitment*, THE PRACTICAL LAWYER, December 1, 1980, at 51 (article reflects the increased concern over inadequate representation for the mentally ill).

137. *See* CAL. WELF. & INST. CODE §§ 5325, 5500-50 (West Supp. 1982).

tor appoint one or more county patient's rights advocate.[138] These advocates are usually social workers. Effective third-party intervention cannot be provided by such minimal services. Moreover, the only program this author found that provided for attorney supervision of patient's advocates was in Santa Clara County. Section 5521 of LPS explicitly separates the advocacy program from county programs that provide legal services, thus depriving the advocate and the involuntarily committed patient of a crucial link with the person who may ultimately defend that patient against confinement.[139] Because of this separation, the patient advocacy program cannot provide the legal representation the patient may require or need. Ready access to attorneys for consultation about patient's rights or attorney representation at such critical stages of the evaluation period as when the patient is advised of his rights, is not available under the present state advocacy program.

Third, hearings at the end of the 72-hour evaluation period should be required for those alleged to be dangerous to themselves or to others as well as those who are gravely disabled. The stigma attached to even a short period of commitment, the possibility of error in the initial determinations of mental illness and the fact that statutory guidelines for commitment are being ignored are factors that strongly support

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138. CAL. WELF. & INST. CODE § 5520 (West Supp. 1982).

139. CAL. WELF. & INST. CODE § 5521 states that the advocates shall not duplicate, replace or conflict with existing local or mandated legal representation and that statutes providing for local public defender or court appointed attorney representation shall remain the responsibility of local agencies. This section does allow for "maximum cooperation" between legal representatives and providers of advocacy services but gives no specific guidelines with respect to the cooperation it mentions. In contrast, New York provides a Mental Health Information Service (MIHS) independent of the hospital and supervised by the appellate court. The MIHS provides legal services for the institutionalized mentally disabled. In at least two of the state divisions under MIHS, attorneys comprise a majority of the staff. Such a program is much more capable of providing for the vigorous pursuit of patients' rights and complaints than is California's current advocacy program. Moreover, because MIHS attorneys represent patients at hearings, delay and duplication of investigative work is avoided thus reducing unnecessary public expense. An ideal patient advocacy staff should consist of both attorneys and social workers. Santa Clara County's program, which has this combination, should be carefully studied by the state. *See* N.Y. MENTAL HYG. LAW §§ 9.08, 9.09, 29.09 (McKinney 1978). *See also* Gupta, *New York's Mental Health Information Service: An Experiment in Due Process*, 25 RUTGERS L. REV. 405, 413-50 (1971); Boderick, *Justice in the Books or Justice in Action: An Institutional Approach to Involuntary Hospitalization for Mental Illness*, 20 CATH. U.L. REV. 547, 619-32 (1972).

this conclusion. Finally, the role of the psychiatrist as both a "predictor" of dangerousness and as a commentator about the patient's condition should be re-evaluated. If used at all, psychiatrists should be used, as Professor Stone has suggested, not to predict, but only to relate whether their findings result in a conclusion that there is a serious, reliably diagnosed mental illness (i.e. profound anxiety, panic, depression, deterioration of the personality) that is treatable and incidentally dangerous.[140] "A compassionate law and a compassionate psychiatrist should direct attention to the issue of human agony rather than the behavior which may or may not flow from it."[141]

As this comment suggests, the road to commitment remains fraught with inconsistencies. Ideally, mental hospitals should be entered voluntarily with the support of friends and relatives in a non-coercive manner. Psychiatrists could then be returned to their original and important role of therapeutic treatment of the mentally ill. As long as California continues to have a system of involuntary commitments, it remains for the courts to continue in their traditional role as "protector of individual rights against state power:"[142] A responsibility that cannot be delegated to the medical profession.[143]

*Gretchen O. Burford*

140. A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION, 66-67 (1975); *see also* COUNTY OF LOS ANGELES, DEPT. OF MENTAL HEALTH, PROPOSED LPS REVISIONS, 14 (2nd draft Nov. 1980). A proposed revision in LPS provides that medical experts give evidence as to diagnosis and treatability. "Predictions of danger, where they are pertinent at all, judgments of competence and decisions concerning detention on an involuntary basis, are made by functionaries of the legal system."

141. STONE, *supra* note 140, at 67.

142. Bazelon, *Institutionalization, Deinstitutionalization, and the Adversary Process*, 75 COLUM. L. REV. 897, 910 (1975).

143. *Id.*